CHANGING DIMENSIONS OF PRINCIPLES OF JUDICIAL ACTIVISM IN INDIA: A STUDY

DOI: 10.62938/rdc-2025-0003

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Abstract

Since the beginning of governance and governed polities, attempts have been made to curtail the power and the scope for arbitrary exercise of power by those in the government. Ever since the fall of the absolute monarchy, and the rise of democracies, there has been an attempt to ensure that there be checks and balances in the governmental framework against absolute and arbitrary exercise of power.

The Concept of Separation of Power gains importance in this context, as it ensures that the three wings of the government the executive, the legislature and the judiciary act independently of each other, and beyond the control or influence of the others. The idea here is that the three wings act as a counterweight against the actions, and separation of powers is done to ensure that a sort of veto power exist within each. The judiciary has an important role to play in this separation as it arbitrates between the executive and the legislature and negates the effect of the actions of the executive and the legislature, which may cause a violation of their basic human rights. Also, it must transform the existing social order to one where justice – social, economic and political, is available to all and there exists freedom of opportunity for all. The aim of this research paper is to highlight the importance of the judicial activism in the contemporary era by giving broader powers to the judiciary to set out the principles which are necessary for the recognition of rights and interpretation of the constitution rationally.

In this context, it is imperative to have a proactive judiciary, which must work to expand the horizons of justice and direct the executive and the legislature to the rising needs of the populace.

Keywords: *Judiciary, Judicial Activism, Interpretation.*

Introduction

There is no divergence in judicial activism. It is an essential component of the factors comprising a well-established court. The counter-majoritarian institution serves as a

check on the power of the majority in a democratic government. However, judicial activism does not imply governance by the judiciary. Furthermore, it must adhere to the limitations imposed by the legal framework. Within such boundaries, it serves the purpose of validating or, less frequently, criticising the actions of various branches of government[1].

The judiciary is the most important component of the State. It strengthens only when people have faith in it. The confidence exhibited by individuals serves to validate the credibility of the Court and judicial activism. Courts must consistently strive to uphold their credibility. They should not succumb to political pressure, but instead, they should remain steadfast regardless of any challenges. The credibility of legal action is sustained not by conforming to populism, but by its capacity to withstand the pressure without compromising its impartiality and objectivity. Courts should not merely appear to be reasonable; they should genuinely embody fairness[2].

Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says; be you ever so high the law is above you"- Justice P.N. Bhaghwati[3]. These eloquent words remained ideal if not worked upon. The slow death of democracy is a warning bell, which is already much fragmented because the process has taken its shape as the systematic actions by the erosion agents. To rectify such debacles and devastation, the independence of judiciary is imperative because it is sine qua non of democracy to affirm its constitutional goals, i.e., justice, fraternity & egalitarianism.

American legal academician Catharine Pierce Wells, in her book Oliver Wendell Holmes: A Willing Servant to an Unknown God, writes, "Sometime between our entry into World War II and departure from Vietnam, Americans became impatient with the idea that the courts should *play the games according to rules,* rather than do justice. Even we never discover an ultimate theory of justice, most of us believe that we recognize injustice when we see it"[4]. Understanding the essence of justice is very tough, as all the members of the bench in itself doesn't have the same understanding of what justice is. The fear of a revival of the traditional textual approach of judges today is not a good sign for the libertarian philosophy of justice.

In 1976, Justice Khanna[5] rejected the textual interpretation of the law and adopted a pure judicial sense based on rationality, but sadly, his legacy was not followed in letter & spirit. There are various examples where the Supreme Court of India has not shown interest in interfering with matters that impact society in general if not addressed in due

[1] Gautam Bhatia, *The Indian Constitution – A Conversation with Power*, HarperCollins India, Delhi, 2025

[2] Ashwini Siwal, Vikas Bhati & Jatin Kalon, "Judicial Activism to Judicial Outburst: Contemporary Analysis of Indian Judicial System," *National University of Juridical Sciences Journal of Regulatory Studies*, Vol. 2(3 & 4), 2024. https://doi.org/10.69953/nurs.v2i3%20&%204.238 (Last accessed on June 26, 2024)

[3] S.P. Gupta v. Union of India, 1982 (2) SCR 365.

[4] Catharine Pierce Wells, *Oliver Wendell Holmes: A Willing Servant to an Unknown God*, Cambridge University Press, Cambridge, 2020, p. 202.

[5] ADM Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.

time. Recently, the Electoral Bond case[6] is an apt example that needs a thorough analysis to understand why slow judicial activism is vanishing the true essence of the justice delivery system. Although the judgment has been applauded, there exist some legitimate questions that deserve an accountable answer from the judiciary. Considering that the decision took seven years to materialize, it should have been applied retrospectively, if not stayed at the first instance during the pendency of proceedings to mitigate the adverse effects of judicial inertia. Given that the core principles of democracy, particularly free and fair elections, were imperiled, the adjudication process should have been significantly expedited. Furthermore, the Court should have implemented their 'committee way' out by constituting a committee to probe into the 'list of donors' as released by the State Bank of India7. Judicial Activism is very much part of the basic structure, and the Constitutional Courts can invoke it when the other institutions fail to take appropriate actions against the governments for the blatant violation of the rule of law. Since 20198, the Supreme Court has fairly recognized the powerless nature of the Election Commission in matters of religious hate speeches, yet the Court decided not to attend to the distress calls from the common citizens, petitioning against hate speeches during the recent election rallies. The petitioners have been asked to approach the Election Commission, despite being aware of the Commission's inaction on the matter. The Judiciary is constantly brushing aside such affairs, cutting dead the necessary intervention which is the need of the hour in the name of separation of powers[9].

The theory of division of powers proposed by Montesquieu and later theorized by numerous authors has brought the idea of an autonomous judiciary a great deal of significance. Many of the world's western democracy currently hold a powerful judiciary. India is the rising nation in the world having potentially the best judiciary. It is equally important to address that Indian judiciary is facing serious criticism on its independent approach. The pivotal role of judiciary has been interrogated in past and recently by the legal experts, academicians, activists. The Indian Supreme Court is the first judicial aid, and the first court of appeal formed under the Indian Constitution. A decision delivered by the Court is binding on any judicial tribunal in India. As the function of statutory interpretation is with the judiciary, the judiciary has interpreted the Constitution to grant itself several powers. Indian judiciary is known for judicial

[6] Anjali Bhardwaj and Amrita Johri, Clearing the Air on the Three Misgivings around the Electoral Bonds Judgement, "The Wire", document is available online at https://thewire.in/government/clearing-the-air-on-three-misgivings-around-the-electoral-bonds-judgement (Last accessed April 14, 2024).

[7] Apar Gupta, Slowing Justice the Committee Way, "Indian Express", April 14, 2024, document is available online at https://indianexpress.com/article/opinion/columns/slowing-justice-committee-way-pegasus-case-frames-cji-ramanas-legacy-8114116/. (Last accessed on June 26, 2024).

[8] On Hate Speeches, Top Court to Look into Poll Body's "Toothless" Argument, document is available online at https://www.ndtv.com/india-news/supreme-court-to-examine-powers-of-election-commission-in-taking-action-against-leaders-violating-mo-2023201 (Last accessed April 20, 2024).

[9] "Indian Express", https://indianexpress.com/article/cities/bangalore/civil-society-citizens-groups-election-commission-9322192/; "Bar and Bench", https://www.barandbench.com/news/supreme-court-dismisses-plea-for-action-against-bjp-pm-modi-for-hate-speech-during-lok-sabha-election-campaign (Last accessed on May 18, 2024).

advocacy, and has often encouraged advocates, legislators and even people to condemn judicial overreach. When there is an apparent legal lacuna, the judiciary is empowered legally to interpret it within the ambit of constitution.

In 1947, the famous historian Arthur Schlesinger, Jr., coined the term judicial activism, and it significantly paved the way towards the liberalization of judicial activism.[10] The idea of judicial activism is not new, even before the 20th Century, the legal philosophers extensively debated over the concept of judicial legislation. John Austin's theory was more inclined towards judge-made law (positive law) and his idea of judicial legislation was reflected in his famous lectures on jurisprudence[11]. There were other eminent philosophers like Blackstone who favored the concept of judicial legislation as the strongest characteristic of the common law[12].

The foundation of Judicial Activism in India was laid down by Justice V. R Krishna Iyer, Justice P. N Bhagwati, Justice O.Chinnappa Reddy, and Justice D.A Desai. From Gopalan[13] to Shivkant Shukla[14], the textual interpretation of the law was a norm followed by the judges of the constitutional courts. Legal positivism was missing from the Apex Court. The liberal and expansive understanding of the law is a necessary ingredient for judges to make the judiciary omnipresent for just cause. In India, it is necessary to define a variety of distinctive features of PIL, each of which is new, and in certain cases contradictory to the conventional legalist definition of judicial operation. By comparison to the case of lawsuits in the public interest in Canada or the United States, the legal aid/public interest campaign in India was started almost exclusively and driven by the judiciary[15]. This sort of textualist approach to the Constitution was also taken up in several early constitutional judgments by the Supreme Court, and whilst this approach has been criticized by later Supreme Court judgments and legal scholars, there was a coherent judicial philosophy behind it. The prime example for

[10] Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, Times Inc., New York, Jan. 1947, p. 202.

[11] Barry Keenan and Douglas W. Kmiec, *The Origin and Current Meanings of Judicial Activism*, "California Law Review", Vol. 92, 2004, p. 1444. https://doi.org/10.15779/Z38X71D (Last accessed on February 20, 2024).

[12] Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Growth of the Common Law*, "Harvard Law Review", Vol. 5, 1891, pp. 172-175. https://doi.org/10.2307/1322154 (Last accessed on November 20, 2024).

[13] A.K. Gopalan v. State of Madras, AIR 1950 SC 27. The Court famously went for a textualist approach in interpreting the phrase "procedure established by law" in the constitutional right to life. Here Kania, J. speaking for the majority stated that if Parliament has made a law, then it is not for the courts to interfere within the scope of Article 21. One could conclude that an originalist approach to the Constitution would have reached a similar conclusion as the majority in *Gopalan*.

[14] ADM Jabalpur v. Shivkant Shukla,AIR 1976 SC 1207. The popular habeas corpus case is one of the most important cases when it comes to rule of law. In this case, the question before the court was 'whether there was any rule of law in India apart from Article 21'. This was in context of suspension of enforcement of Articles 14, 21 and 22 during the proclamation of an emergency. The answer of the majority of the bench was in negative for the question of law. However, Justice H.R. Khanna dissented from the majority opinion and observed that "Even in absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life and liberty without the authority of law. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning".

[15] P.N. Bhagwati & C.J. Dias, *The Judiciary in India: A Hunger and Thirst for Justice* 171 *Nirma University Journal of Student Law Review* 174 (April 2012).

this can be seen in State of Rajasthan v. Union of India[16], where the Court permitted for only a limited intervention of the courts when there was an exercise of Article 356(1) by the Union Government. In this case as well the Court went for a more textualist approach and adopted judicial restraint[17].

The evolution of judicial activism in India, has moved through several spheres from the 1950's which marked the beginning of the push between the Supreme Executive and the Supreme Judiciary; the Constitutional Amendment jurisprudence in the 1970's and to the birth of social action litigation (SAL) as an evolved phase from public interest litigation (PIL), as the concept had originally begun. Activism by the judges has always been the eye of the storm through the times due to its setting in an apolitical sphere that often blurs the distinction between the matter being set in a political atmosphere and the court commenting on an act that is largely in the political, or executive domain. Hence, the allegations of judicial activism are never made on technical grounds (that the judges should have used a different logic in ruling etc.) but always on political grounds, implying that there was insufficient collaboration between the apex judiciary and the supreme executive of an order that sustains the legitimacy of the latter[18].

The Courts have shifted from merely serving the elitist and capitalist to serving the cause. This has allowed the indigent to gather the courage to seek justice before seeking justice at all. The limited path to status was also explained by floodgate claims, the need to preclude intermeddlers, and the courts' refusal or reluctance to adjudicate on issues better left to the discretion of policy makers, attorneys general, and other so-called public interest guardians[19].

1. Evolution of Judicial Activism

All written constitutions that have incorporated the spirit of 'division of powers' put restrictions on the powers of the legislatures and the executive, not barring the judiciary; this is seen as a feature in most countries that have incorporated the principle of 'Separation of Powers' as their basic underlying feature. The task of the courts is to ensure that these limits given by the constitution are not exceeded as well as to promote and aim to achieve the constitutional goals by giving 'real' and 'meaningful' interpretation to such a constitution. Hence, a court can be said to be an activist court when it serves the changing needs of society by refurbishing interpretation accordingly[20].

[16] State of Rajasthan v. Union of India 1977 AIR 1361.

[17] S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, Oxford University Press, New Delhi, 2002.

[18] Upendra Baxi, *Judicial Activism: Usurpation or Re-Democratization?*, Cambridge University Press, Cambridge, 1997, p. 47.

[19] Saara Upadhyaya, "Transformative Justice: Judicial Activism as a Catalyst for Constitutional Evolution in India," *LawFoyer International Journal of Doctrinal Legal Research*, II(IV), Dec 2024. http://dx.doi.org/10.70183/lijdlr.2024.v02.41 (Last accessed on December 26, 2024).

[20] S.P. Sathe, *Judicial Activism in India*, Oxford University Press, New Delhi, 2000, p. 5.

The judiciary needs to respond to the changing needs of the times and that is how activism evolves. In the beginning, the Supreme Court of India was extremely technocratic in nature but gradually began to acquire muscle and prestige through its liberal interpretations of the law. This can be said to have started with judicial review in A K Gopalan's Case[21] asserting that this power was inbuilt in the very nature of the Constitution itself. Using Article 13 as a cushion the Supreme Court went on to state that it was its duty to protect the fundamental rights of the citizens[22]. It also takes liability for the reading of the Constitution by the courts and for the judicial examination of legislative actions[23]. The dynamic interpretations of the constitution through judicial review, rather than a mere technocratic interpretation would mean that the judiciary is keeping within its role of keeping the Constitution abreast with the changing times, whereas at the same time it could be said that they are infringing upon the powers of the legislature[24]. Judicial Activism can be defined as, that "practice to render unconstitutional the tyranny of the majority"[25]. Judicial activism also refers to the practice of judicial review, as previously mentioned, where the courts strike down the laws passed by the legislature and the acts of the executive which are unconstitutional. This requires the act of the judges to fill the holes, understand the constitution's fluid clauses and give rise to judicial creativity for a better understanding of the law[26].

The researcher understands that judicial activism also means an active role played by the Courts in enforcing the rights of the individuals in achieving and enforcing the constitutional goals. It involves giving a liberal and broad interpretation to the provisions of the Constitution to meet the needs of changing society and its values; this becomes a necessity rather than a longing in the present context. It involves giving a more meaningful interpretation of the rights of the citizens to ensure a better living and to give effect to the constitutional goals and ideals. This practice may involve the judiciary taking up functions that it earlier didn't perform or performed in a very limited manner. However, this is not to suggest that the judiciary didn't have the required power to do so and that what it is doing now is more than its power. In *S.R. Chaudhuri* v. *State of Punjab*[27], the Apex Court said "the mere existence of a constitution, by itself, does not ensure constitutionalism. What is important is the political traditions of the people and its spirit and determination to work out its constitutional salvation through the chosen system of its political organization". Unless primacy to democratic policies and

[21] A K Gopalan v. State of Madras, AIR 1950 SC 27.

[22] *Ibid*.

[23] Akash Singh Raj & Akanksha Singh, *"Judicial Review of Legislative Actions"*, *Journal of Constitutional Law and Jurisprudence*, Vol. 6(1), 2023, pp. 91-101. https://lawjournals.celnet.in/index.php/Jolj/issue/view/170 (Last accessed on June 29, 2025)

[24] Meera Sapatnekar, *The Role of the Judiciary in Judicial Activism*, "Indian Bar Review", Vol. 25(1), 1998, p. 69.

[25] R.R. Vadodaria, *Constitutional Crisis and Judicial Activism*, "Indian Bar Review", Vol. 27(1), 2000, p. 69.

[26] S. Tharani, "A Critical Analysis on Judicial Review, Judicial Activism and Judicial Restraint in India," *International Journal of Law Management & Humanities*, Vol. 4(3), 2021, pp. 4361-4385. https://ijlmh.com/paper/a-critical-analysis-on-judicial-review-judicial-activism-and-judicial-restraint-in-india/# (Last accessed on May 26, 2025).

[27] S.R. Chaudhuri v. State of Punjab (2001) 7 SCC 126.

individual rights is not given Constitutionalism cannot survive. Subtle assaults on individual rights, especially freedom of speech and expression and privacy, such as sedition laws, surveillance laws, undermine Constitutionalism.

The judiciary has always had power; however, it earlier didn't require the said power for the other two branches, i.e. the legislature and the executive were doing their job. The court has not become an activist court suddenly, but it has been a process taking place over a period. This can directly or indirectly be attributed to the relative erosion of the political leadership that prevailed before independence and in the initial years after independence, the excesses committed by the executive, the violation of human rights that have been rampant and the failure of the legislature to address and pass laws for a variety of important issues[28].

2. Judicial Activism and constitutional obligation

A legislation that is passed, given the lawmaker's best intentions and capacity, cannot foresee all potential circumstances to which the legislation can demand implementation in the future. New conditions arise and the legislation is required to be understood and interpreted with a view to enforcing it. It is the field or domain of judicial imagination to fill the void because it would be between the current statute and the constitution. The judges must face the fact that the standards appropriate to society often shift as culture develops, and that when discharging the constitutional duties, they must establish the law on those lines. In India, the Judiciary has advanced human rights by buckling down the lacuna left by legislative shortcomings[29].

One important argument which arises is whether interpretations of the vocabulary of the Constitution should be limited to what the original framers intended it to be, or whether there is scope for the judiciary to change the interpretations as and where required[30]. The Supreme Court has time and again evolved its interpretation of certain constitutional guarantees to conform to the changing needs of society. The Court admits that the presumption that framers could have foreseen every eventuality that would surface in the passing decades is illogical[31]. This would mean that the Indian Constitution would perpetually be stagnant and thus not evolving as it was meant to.

3. Importance of Judicial Creativity

Constitutional advocacy has played a significant and essential function in preserving privileges and liberties of citizens, as enshrined in the Constitution. The courts have

[28] B. Sandeepa Bhat, "Judicial Activism in Regulating 'Human Rights Violations' by Police Authorities in India", *Kathmandu School of Law Review*, Vol. 5(2), November 2017, pp. 104-112. https://kslreview.org/index.php/kslr/article/view/986 (Last accessed on May 10, 2025).

[29] Justice A.S. Anand, *Judicial Review – Judicial Activism – Need for Caution*, "Journal of the Indian Law Institute", Vol. 42(2), 2000, p. 149.

[30] Granville Austin, *Working a Democratic Constitution: The Indian Experience*, Oxford University Press, Delhi, 1999.

[31] Justice A.S. Anand, *Protection of Human Rights – Judicial Obligation or Judicial Activism*, (1997) 7 SCC (J).

put on a progressive approach and have stepped in to save the aggrieved populace. In a variety of instances, the courts viewed the constitutional clause in its widest context to uphold basic civil liberties and human freedoms. Our judiciary established the idea of litigation for social change and litigation for public benefit by discarding its own authority from the conventional and self-imposed limits. In a developing country such as India, publicly oriented litigation suits the rule of law best if it were to operate similar to the rule of life. The judiciary plays a very active role in almost every aspect of life. Implementing various constitutional provisions, environmental concerns, and the courts took cognizance of each case and set out separate decisions to uphold the basic human rights of each member of society. Today the conventional concept of locus standi is supplemented by collective action lawsuits, with the massive shift in the legal procedure. In the final review, it can clearly be argued that judicial liberalism has played a major part in securing civil rights. In other words, it has also proven to be a blessing to the perpetrators of unlawful, unethical and unconstitutional acts by both the state and civil servants[32].

4. Cumulative Role of the Supreme Court

The Supreme Court of India has given itself powers to devise essential means by which they can better administer justice. It has interpreted that the powers given to it under Article 32 of the Constitution of India is itself a Fundamental Right, thus imposing a constitutional obligation upon the judiciary to create such tools that would be required to enforcing the fundamental rights guaranteed in the Constitution[33]. Furthermore in the case of M.C. Mehta v. Union of India (Shriram – Oleum Gas) the court emphasized that in a fast changing society the courts must keep pace with it or become without serving a purpose at all.

The Supreme Court has awarded itself a certain degree of power that is far exceeding what it was meant to possess as per the framers of the Constitution. Yet at the same time the question which arises is whether these powers that they have usurped from, or are now sharing with the other organs, are justifiable. At the same time, it must be remembered that the most important question which should be answered is whether it is normatively preferable to have such practice as Judicial Activism.

Manifestations of Judicial Activism

One of the main methods by which Judicial Activism has made itself visible is through the broad interpretation of fundamental rights. For example, Article 14 has been held as providing protection against any arbitrary action. Also, the courts have insisted that in the giving of government contracts, article 14 must be followed. The

[32] Shatakshi Singh, *"Judicial Review of Administrative Action: A Comparative Study of India and Australia"*, *International Journal of Law Management & Humanities*, Vol. 6(6), 2023, pp. 766-774. https://ijlmh.com/paper/judicial-review-of-administrative-action-a-comparative-study-of-india-and-australia/# (Last accessed on May 26, 2025).

[33] Nilabati Behera v. State of Orissa, AIR 1993 SC 1960.

courts have also held sexual harassment to be violative of article 14. Another excellent example by which Judicial Activism has made itself visible is by how it has expanded the meaning of Article 21 to include such rights as the right to livelihood[34], the right to medical care and even shelter[35].

Secondly, another manifestation of judicial activism can be said to be regarding the amendments to the Constitution. The Supreme Court came up with the notion of 'basic structure' where in put a restriction on the legislature saying that it amends the constitution in all respects, except that the 'basic structure' cannot be interfered with[36]. This they have done very carefully for their benefit, because they have not demarcated explicitly as to what constitutes this 'basic structure'. The basic structure principle was a completely new constitutional principle.

Thirdly, the Supreme Court has held that in the absence of legislation in certain spheres of jurisprudence where there are no laws to guide, it can pass temporary guidelines and give directions, until the legislature makes a law in that regard. This has been seen in numerous cases, for example the court laid down guidelines regarding sexual harassment in the Vishaka Case or in *Laxmi Kant Pandey* v. *Union of India*[37] it laid down guidelines concerning inter-country adoptions.

Other manifestations of the active role of the judiciary can be seen in such areas of jurisprudence as Public Interest Litigation, the power to review the proclamation of an Emergency by the Executive[38], and the making of liberal interpretations regarding the entries in lists in the Seventh Schedule of the Constitution. The realm of judicial activism has been traditionally seen as a tussle between the supremacy of the judiciary and the executive, especially in matters concerning political considerations. It started out with the host of cases surrounding constituent powers to the recent spate of amendments to even legislation to over-rule the decision of the courts.

Limitations on Judicial Activism

The argument that the judiciary being a non-elected body should not be allowed to overrule the decisions of the parliament which represents the will of the people at large, was answered in part in Kesavananda Bharti's[39] case, where the court said that the constitution provided protection to the minorities and if the majority opinion would be taken as the guiding factor, then the protection to the minorities would become useless. Also, in India, a party or a coalition of parties can form the government without even securing most of the votes and thus such a coalition should not be able to tamper with the basic features of the constitution.

[34] Olga Tellis v. Bombay Municipal Corpn., (1985) 3 SCC 545.
[35] Chameli Singh v. State of Uttar Pradesh, AIR 1996 SC 1051.
[36] Kesavananda Bharati Sripadgalvaru v. State of Kerala, AIR 1973 SC 1461.
[37] Laxmi Kant Pandey v. Union of India AIR 1984 SC 469.
[38] S. R. Bommai v. Union of India, AIR 1994 SC 1918.
[39] Supra Note 13.

The activist role of the court should not be misunderstood as allowing the courts to do whatever they wish to do. The courts are themselves bound by the constitutional limits[40]. The powers which have been given to the court are not for the purpose of personal aggrandizement but are for the purpose of upholding the constitutional principle[41]. Judicial creativity cannot take the form of rewriting the constitution or legislation. While interpreting the constitution in line with the changing society, the integrity of the constitution should not be undermined[42]. The judges always must function within the limits of the constitution.

There are also limits to the extent the judiciary can read into a provision of a statute. The court just interprets the law and cannot legislate it[43]. The judicial law making although must be in relation to the dispute or the case on hand, the principles which they lay down are for future application also[44].

5. The understanding of judicial activism and judicial restraint

The birth of Public Interest Litigation was with a mere expansion of the locus standi of the court to allow access of the Supreme Court to poor litigants on whose behalf any member of the Indian society could file a writ petition for human rights violations. The understanding of PILs has moved on to what is coined as Social Action Litigation, where courts play an active role in rendering a "voice to the voiceless" and the function of the courts is re-examined and re-appraised considering the social conditions of different eras. Hence, Courts are an instrument of social engineering, where it is the responsibility of the judiciary itself to hold the government's charter up to date with the times and not allow it to be out of tune with the day's need. And therefore, courts are expected to behave in a sense of *pro bono publico*[45].

The role of a constitutional court as an engine for social engineering, therefore, becomes that of judicial activism, which is not an aberration. It is in fact an essential function, which must be exercised within restraints and bounds[46]. Such limits are mostly self-imposed, primarily to reduce the vagaries which arise from the judges' subjective lapses or biases. Therefore, courts are reluctant to comment on economic policy issues because those questions involve complex considerations not fit for adjudicatory justice and rather belong to the realm of the rough and tumble of

[40] Justice J.S. Verma, *The Constitutional Obligation of the Judiciary*, Supreme Court Cases, New Delhi, 1997, p. 7.

[41] *Ibid*.

[42] Justice M.N. Rao, Judicial Activism, "EBC", document is available online at https://www.ebc-india.com/lawyer/articles/97v8a1.htm (Last accessed April 27, 2024).

[43] Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corpn., (2003) 2 SCC 455.

[44] Christopher P. Banks & David M. O'Brien, *"The Scope and Limits of Judicial Power"*, in *The Judicial Process: Law, Courts, and Judicial Politics*, SAGE Publications Ltd, London, 2025, ch. 10, pp. 210-235 https://doi.org/10.4135/9781483395517.n10 (Last accessed June 27, 2025).

[45] Manoj Kumar Sinha, "Judicial Activism vs Judicial Restraint: A Comparative Review of Landmark Cases," *Indian Journal of Law*, Vol. 2(4), 2024. https://doi.org/10.36676/ijl.v2.i4.49 (Last accessed March 20, 2025).

[46] S. Sharma, "Judicial Activism vs. Judicial Restraint: A Critical Analysis in the Indian Context," *Indian Journal of Law*, Vol. 1(1), 2023. https://doi.org/10.36676/ijl.2023-v1i1-03 (Last accessed on August 21, 2024).

politics[47]. This makes judicial activism and restraint not two separate poles, rather, restraint is a tool to keep the judiciary within its bounds of activism. In the present case, the basis of the court's ruling was purely on constitutional grounds and hence was well within their adjudicatory role[48].

6. Impact upon Separation of Power

It is the opinion of the researcher that though it, i.e. the Supreme Court and the judiciary in general, might be performing certain roles that are the duty of the legislature and the executive. However it is the tardiness of the legislators and the executive's reluctance to answer the concerns of citizens regarding abuses of their civil rights that render judicial action incumbent[49]. In cases where the executive refuses to follow the legislative mandate, the judiciary has to step in to ensure compliance with the legislative mandate or where the judiciary is apprised of gross human rights violations, it cannot prevaricate[50]. It is however, still acting within the constitutional limits and powers given to it, though it may not have been performing these roles earlier as the other branches were doing their duty. Thus, it cannot be said to have 'usurped' the role of the legislature or the executive[51]. The role of the courts in striking down a statute or an executive as unconstitutional is not to confront the other and to assert its superiority, but only to discharge the constitutional duties[52].

Positive advocacy is a judicial concept that protects the interests of the oppressed groups, which places curbs on the state's total authority which encourages access to justice[53]. It is submitted that the activism is also positive, when it furthers the rights not only of the disadvantaged sections but furtherance of human rights as a whole to lead to a more valuable meaning of 'life', and also when the courts fulfill their obligation by aiming to achieve the constitutional goals and by ensuring that the other branches also work in that direction, even if it involves taking up functions, "within the limits of the power" granted to them by the constitution, that were not earlier performed like issuing directives, guidelines in the absence of legislation.

The court was earlier perceived as a technocrat responding to legal queries but the change gradually began with the courts giving wide interpretation to the constitutional provisions in accordance with the changing demands of society and thus not playing only the role of a technocrat[54]. But even within the initial years after

[47] Madhwendra Tiwari & Tarun Rai, "Social-Economic Justice and Judicial Activism in India: An Analytical Study," *Ajasraa*, Vol. 13(1), 2024. https://doi.org/10.7492/fs0nt339 (Last accessed on December 29, 2024).

[48] Upendra Baxi, *The Indian Supreme Court and Politics*, Eastern Book Co., Lucknow, 1980.

[49] Supra Note 22.

[50] *Ibid*.

[51] A.T. Markose, *Judicial Control of Administrative Action in India: A Study in Methods*, Madras Law Journal Office, Madras, 1956, p. 1 (digitized and catalogued via HathiTrust Digital Library). https://lawcat.berkeley.edu/record/42736 (Last accessed on June 30, 2025).

[52] Rajindar Sachar, *Role and Development of Judiciary*, "Indian Bar Review", Vol. 25(1), 1998. https://www.scribd.com/document/735928163/EVOLUTION-OF-JUDICIAL-ACTIVISM-IN-INDIA (Last accessed on October 11, 2024).

[53] Supra Note 16.

[54] Id at 07.

independence the shift was evident from the courts decisions regarding the freedom of press and the also the judgments during the 1962 emergency, when the courts laid down the grounds for challenge to preventive detention, notwithstanding the suspension of the fundamental rights, or that caste cannot be the only basis for giving reservations[55]. The greatest transformation in the judiciary occurred in the post emergency phase, when the judiciary increasingly became active through PIL while interpreting basic rights of the citizens[56].

It cannot be denied that the courts have, through judicial activism, played the role of the executive in some cases, and in other cases the role of the legislature. Yet it must be examined as the researcher has previously stated whether this has been done because of necessity or because of how hungry the judiciary has been. The researcher has concluded that the judiciary has in most cases been working for the benefit of the public by taking over certain powers that were traditionally regarded as to being those of the executive or of the judiciary. The other question that needs to be asked at this juncture is whether judicial activism can be normatively and objectively good though it might be in prima facie violation of the Constitution of the country. The opinion of the researcher in this regard is a bit ambiguous because on the one hand the Constitution of the country is its bed rock, and Separation of Powers would have to fall into that category of 'basic structure' that was enunciated ironically by the judiciary through judicial activism and should thus not be interfered into. Whereas at the same time, the Constitution needs to keep pace with the evolving times, and if the Executive and the Legislature themselves are incapable of guiding the Constitution in this respect, it must fall upon the other organ of government, i.e. the judiciary to shoulder the responsibility to taking the Indian Constitution into the Twenty First Century. Thus, it is a huge dilemma that faces the researcher in resolving the conflicting positions regarding the usefulness of judicial activism.

7. Comparative Perspective: Judicial Activism in Europe

While judicial activism in India has developed in its own way to deal with socio-political issues and constitutional crises, comparable patterns exist in jurisdictions in Europe, notably Germany, Romania, and the European Court of Human Rights (ECtHR). These cases offer rich comparative context for comprehending the worldwide development of judicial power.

In Germany, the Federal Constitutional Court (Bundesverfassungsgericht) has often asserted its jurisdiction to uphold constitutional identity and safeguard fundamental rights. A landmark case in this context is the Lüth decision, where the Court established that basic rights are not just defensive rights of the individual against the

[55] Balaji v. State of Mysore, AIR 1963 SC 649; Makhan Singh v. State of Punjab, AIR 1964 SC 1120.

[56] Ravi Bhatia, *Evolution of Judicial Activism in India*, "Journal of the Indian Law Institute", Vol. 45(2-4), 2003, p. 262. https://www.scribd.com/document/735928163/EVOLUTION-OF-JUDICIAL-ACTIVISM-IN-INDIA (Last accessed on June 28, 2025).

state but also objective orderings of value that have a bearing on all fields of law, including private law[57]. This proactive interpretative stance has an equivalent resonance in India's own extension of fundamental rights under Article 21. The Lisbon Treaty Judgment has also reasserted the Court's role of examining the boundaries of European Union integration according to German constitutional identity and democratic legitimacy[58].

In Romania, the Constitutional Court emerged prominently for standing firm in ruling on political conflicts and upholding the rule of law. In particular, the Court's jurisprudence on anti-corruption enforcement and judicial autonomy evinces its activist stance, paralleling India's judiciary before and after the Emergency years[59]. Romanian judicial activism played a pivotal role in upholding democratic integrity against the gravitation of executive tyranny.

At a international level, the European Court of Human Rights has undertaken an expansive interpretation of civil liberties, one that resonates with India's judicial innovation in social rights. In Soering v. United Kingdom, the ECtHR[60] adjudicated that extraditing a German citizen to the U.S. would be against Article 3 of the European Convention on Human Rights because of the threat of inhuman treatment on death row. Such judicial activism is paralleled in India's own doctrine development, where the judiciary has reinterpreted constitutional provisions to safeguard individual liberty and dignity. Together, these examples define a transnational trend of judicial innovation, wherein courts went beyond formalist readings to safeguard constitutionalism and democratic ideals. The socio-economic justice promoting and the basic structure doctrine enforcing role of the Indian Supreme Court finds it in the same line of judicial evolution as Europe.

Conclusion

There has been an increasing interference of the Higher Judiciary in India. It has taken what may be termed as an extremely activist stand, especially regarding the issue of fundamental rights, or the entire eliciting of the basic structure doctrine. Even as in its earlier stages it was content to follow the governments taglines and rampantly endorsed them, yet today it has chosen to forge forward on its own. We can clearly see that the judiciary is not usurping power from the other wings of the government. We cannot ignore the positive consequences that activist role of the judiciary has led to public interest litigation be available to the people, and all the other steps it has ensured to provide greater access to and justice itself to the people.

[57] Lüth, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 15, 1958, 7 BVerfGE 198 (F.R.G.).

[58] Lisbon Treaty Case, BVerfG, 2 BvE 2/08, June 30, 2009 (F.R.G.).

[59] Bianca Selejan-Guțan, Decision No. 141/2010, Romanian Constitutional Court, May 4, 2010, Off. Gaz. Rom., Part I, No. 349, May 26, 2010.

[60] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

We must therefore look to establish a balance between a passive judiciary and one that is over-interventionist.

In modern democracies, enormous powers are concentrated in the hands of the executives, and the legislature too often functions merely as its extended arms without adhering to and performing constitutional obligations. Sometimes, it becomes a necessity for the higher judiciary to step in to protect its subjects. The Supreme Court is the only institution which set limits on the state's unbridled power. The Constitution is the supreme nor the Judiciary or the Legislature or the Executives, but the Judiciary is the final interpreter of the Constitution by which it shields the Constitution.

Judicial activism has long been viewed as an example of judicial overreach, but it is a wrong perception built against the judiciary. The judiciary must act to overcome larger social institutions or biases that preclude meaningful legal action. The separation of powers has not been affected by the proactive approach of the judiciary; judicial activism makes democracy more cherished and vibrant. The incumbent Chief Justice of India has rightly said, "Judiciary as a North Star" is an apt example to understand the necessity of judicial activism at times of apparent violation of the law and failure of the executive and legislature to act swiftly to deliver the desired results. It is imperative to know that judicial activism is a necessary sword to ensure justice without delaying or waiting for procedural mandate. There is a tendency that some institutions may come under political pressure or any other influence by political superiors, so, it becomes an essential duty for judges when legislative and executive turn out callous in their work and fail to deliver the results as mandated to them by the constitution. The judiciary can't sit as a mute spectator or ideal when the principles of democracy are continuously degrading. The activist approach by the Higher Judiciary has brought forward the urgency of public issues.

In such a scenario, the judiciary was forced to play an active role. It was possible only through an institution like judiciary which is vested with powers to correct the various wrongs in society. To prevent the compromise of democracy, the Supreme Court and High Courts took the responsibility of solving these problems.

This research has mapped the evolving boundaries of judicial activism in India, from its classical constitutional adjudications to its current activism in support of socio-economic and political rights. The study shows that the Indian judiciary, especially the Supreme Court, has evolved from a passive arbitrator into an activist constitutional sentinel. Major developments like the growth of Public Interest Litigation (PIL), the enunciation of the basic structure doctrine, and judicial intervention into issues of governance, environmental concerns, and human rights are all symptoms of this change.

The study emphasizes that judicial activism in India has tended to fill legislative and executive space, particularly in safeguarding marginalized groups and holding the state accountable. But with this augmented role has come controversies regarding judicial overreach and separation of powers. The constitutional courts can efficiently

reinforce democratic principles as well as constitutional primacy without vitiating institutional legitimacy.

The research findings can be utilized in various ways. At the academic level, the study adds to the comparative constitutional law literature and provides a balanced framework for explaining judicial behavior in transition democracies. In practical application, the insights may help legal practitioners and judges in harmonizing activism with judicial restraint, particularly where there is policy aspects involved. Policymakers and lawmakers may also gain from learning how judicial interpretations shape public policy, leading to more representative and constitutionally legitimate lawmaking.

The analysis of judicial rulings to evaluate their long-term implications on democratic leadership and institutional responsibility. In the face of new challenges like populism, ecological degradation, and technological upheavals, the changing role of the judiciary continues to be critical. Judicial activism, if it is applied within constitutional limits, will remain a bulwark of democratic strength in India and elsewhere.